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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1063

SOUTHWIRE COMPANY and ROY RICHARDS,
Petitioners

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Southwire Company and Roy Richards, petition for a writ of certiorari to issue to review the decision in this case, published July 27, 1970, and the judgment entered August 26, 1970, adjudging Petitioners in civil contempt, on which rehearing was denied October 28, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in the Appendix to this Petition, pages 53-66, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered August 26, 1970. (App., pp. 67-69).[1] Rehearing and rehearing en banc was denied by the Court of Appeals on October 28, 1970. (App., pp. 70-71). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether a Special Master, appointed to hear evidence in a contempt proceeding before the Court of Appeals, may take judicial notice of prior judicial decisions based on lesser degrees of proof, and use those decisions to establish an element necessary to adjudge a Respondent in contempt.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the due process guarantee contained in the Fifth Amendment to the United States Constitution, the pertinent portion of which reads:

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . ." U.S. Const. amend. V.

STATEMENT OF THE CASE

This action was initiated on December 27, 1967, when the National Labor Relations Board (hereinafter referred

[1] Page references to the separate Appendix to this Petition are designated by the abbreviation "App."

to as the "Board) petitioned the Fifth Circuit Court of Appeals to adjudge Southwire Company and its president, Roy Richards (hereinafter referred to as "Petitioners"), in civil contempt. The Board alleged forty-seven (47) violations by Petitioners of two earlier decrees by the Fifth Circuit Court of Appeals. (App., p. 45). Those earlier decrees had forbidden Southwire Company from discouraging union membership by unlawful interrogation, threats, or discrimination against its employees, or in any other manner interfering, restraining, or coercing its employees in their right to organize for collective bargaining. (App., pp. 38-39). The Court of Appeals, after Petitioners answered denying the allegations contained in the Board's petition, referred the matter to a Special Master to determine the issues of fact and law raised by the respective pleadings. (App., pp. 1-5).

The Special Master held a prehearing conference on June 7, 1968, at which Petitioners and the Board were represented by counsel. At that conference, counsel for the Board requested the Special Master take "official notice" of four reported cases previously decided by the Fifth Circuit Court of Appeals and involving Petitioner Southwire Company. (App., p. 14)[2] The four cases desired noticed were *NLRB vs. Southwire Company*, 133 NLRB 83, enfc'd 313 F2d 638 (5th Cir., 1963); *NLRB vs. Southwire Company*, 143 NLRB 1329, enfc'd 352 F2d 346 (5th Cir., 1965); *Southwire Company vs. NLRB*, 159 NLRB 394, enfc'd in part 383 F2d 235 (5th Cir., 1967); and *Southwire Company vs. NLRB*, 164 NLRB 135, enfc'd 393 F2d 106 (5th Cir., 1968). The first two decisions con-

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[2] The Appendix reference here is to a portion of the Official Transcript of the prehearing conference of June 7, 1968. This transcript is a part of the certified record in this case, but for the Court's convenience, the pertinent portions of the transcript are set forth in the Appendix to this Petition.

tained the decrees which Petitioners were alleged to have violated in this proceeding. The latter two decisions were unconnected with this case, but admittedly involved unfair labor practice violations on the part of Petitioner Southwire Company.

Specifically, the Board sought to have official or judicial notice taken of each of those proceedings in order that the Special Master might consider, in this case, the Company's anti-union animus as indicated by the unfair labor practice findings of the four prior cases. (App., p. 15). This procedure was objected to at the time by counsel for Petitioners. (App., pp. 14, 16, 20) The Special Master delayed ruling on this question but stated, "if I rule I am not taking official notice you can be quite sure that as a skilled trier of facts . . . I will not." (App., p. 23).

By his Order of September 24, 1968, the Special Master after due consideration denied the Board's request for "official notice". (App., pp. 24-29). The Board moved for reconsideration of the Special Master's Order, and again on October 4, 1968, the Special Master denied that request. (App., pp. 30-33). From October 7 through October 15, 1968, and from November 11 through November 21, 1968, the Special Master then conducted the hearing on the evidence. (App., p. 37).[3]

On July 9, 1969, the Special Master issued a Report on his findings and recommended Petitioners be adjudged in civil contempt. (App., pp. 34-52). Contrary to his Orders and oral assurances the Special Master cited each

[3] The Appendix reference here is to the Report of the Special Master filed with the Court of Appeals, and which is a part of the certified record in this case. For the Court's convenience, however, the pertinent portions of the Special Master's Report are set out in the separate Appendix to this Petition.

of the four previous reported decisions at the outset of his Report in partial support of the proposition: "There can be no question that the Company possesses deep-seated anti-union animus . . ." (App., p. 44). The Special Master then proceeded to discuss each of the various allegations of contemptuous acts and made specific mention of his reliance upon the judicially noticed material on *eleven* separate occasions in his Report.

Petitioners objected before the Court of Appeals to the entire 223-page Report of the Special Master upon dual grounds: (1) it was erroneous in the first instance for the Special Master to take such judicial notice, and (2) it was erroneous under the circumstances, because of Petitioner's reliance induced by the Orders and oral assurances of the Special Master.

The Court of Appeals, in its review of the Special Master's Report, adopted his findings of fact and conclusions of law in their entirety. (App., p. 66). The Court avoided resolving the question of propriety of taking judicial notice raised by Petitioners. The Court's decision simply stated there was no indication that the Special Master relied on the prior proceedings in any substantial manner to find anti-union animus. (App., p. 57).

The basis for Federal jurisdiction in the court of first instance, the United States Court of Appeals for the Fifth Circuit, was the Labor-Management Relations Act, Section 10(e), 29 U.S.C. § 160(e), granting the National Labor Relations Board the power to petition the United States Court of Appeals, for the circuit wherein the unfair labor practice in question occurred, for enforcement of its order.

REASONS FOR GRANTING THE WRIT

This case involves a question of the basic and fundamental fairness which should be accorded all litigants. Petitioners here have been denied that fundamental fairness.

It is clear that two separate and distinctly different degrees of proof are necessary to carry the proponent's burden in an administrative hearing before the Board and a contempt proceeding before a Court of Appeals. In an evidentiary proceeding before the Board a proponent need only prove his case by a "preponderance" of the evidence. "Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion", has been held sufficient to support a finding for the proponent. *Consolidated Edison Co. v. National Labor Relations Board*, 305 US 197, 229 (1938); *National Labor Relations Board vs. Columbian Enameling & Stamp Co.*, 306 US 292, 300 (1939). So long as that finding is supported by substantial evidence on the record as a whole it will then stand review by a Court of Appeals. *Universal Camera Corp. vs. National Labor Relations Board*, 340 US 474 (1951). The four previous decisions of which the Board requested the Special Master to take official notice were court reviews of Board proceedings.

In a contempt proceeding a bare "preponderance" of the evidence will *not* suffice to show a Respondent in contempt. Acts alleged to be in civil contempt of court decrees must be established by "clear and convincing evidence". *Washington vs. Central of Georgia Railway Co.*, 174 F.Supp. 33 (M.D., Ga., 1958), aff'd, 268 F2d 445 (5th Cir. 1959), cert. denied 361 US 943 (1960); *Telling vs.*

Bellows-Claude Neon Company, 77 F2d 584 (6th Cir. 1935), cert. denied 296 US 594 (1935); Cf. *Oriel vs. Russell*, 278 US 358, 362-363 (1929). The circuit courts are in accord that a heavy burden of proof rests upon the party urging contempt. *NLRB vs. Tupelo Garment Co.*, 122 F2d 603 (5th Cir. 1941); *Hart, Schaffner & Marx vs. Alexander's Department Stores, Inc.*, 341 F2d 101, 102 (2d Cir., 1965); *Stringfellow vs. Haines*, 309 F2d 910, 912 (2d Cir., 1962); *Kansas City Power & Light Company vs. NLRB*, 137 F2d 77, 79 (8th Cir., 1943).

The burden of proving Petitioners in contempt was upon the Board at the hearing before the Special Master. *Washington v. Central of Georgia Railway Co.*, 174 F.Supp. at 37. The Board had the burden of showing—not by a mere preponderance of the evidence—but by clear and convincing evidence that Petitioners had committed contemptuous acts. The element of "anti-union animus" is strong medicine before the Board, and routinely, Board counsel injects this factor into an administrative hearing by moving the Trial Examiner to "officially notice" previous violations by an employer. Official notice by an administrative hearing officer would not involve different degrees of proof. In this case, however, the effect of the Board's motion[4] was to reduce its burden of proof in a judicial contempt proceeding by establishing "anti-union animus" from previous findings which

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[4] It is clear from the remarks of the Board's counsel at the pre-hearing conference what the Board intended to have officially noticed in those four prior proceedings. As the Board attorney explained:

> "[Taking official notice] would include the facts found by the Board and proved by the Court in those cases and the statements made therein." (App. p. 15).

The Board's reason for requesting "official notice" is also apparent:

> "We believe the history of this Company makes it clear and will aid [the Special Master] in deciding the motivation for many of the actions that we allege are . . . violative of the Court decree and put the Company in contempt." (App., p. 19).

were based on a degree of proof less than "clear and convincing."

Petitioners at the pre-hearing conference objected to this procedure on the basis that it would reduce the degree of proof required of a portion of the Board's case. (App., p. 20).

The Special Master in this Order of September 24 *denying* the Board's request for official notice recognized:

> "[The Board], in seeking to invoke the doctrine of Official Notice, is *attempting to establish critical facts in a contempt proceeding which were established in earlier administrative proceedings under the 'substantial evidence' rule.* The doctrine of official notice should not be used to alter the degree of proof required in a contempt proceeding." (App., p. 28). (Emphasis supplied)

On October 4 the Special Master denied a Motion for Reconsideration of his Order of September 24. (App., p. 30). At the pre-hearing conference the Special Master had assured Petitioners that if he ruled against taking judicial or official notice then he would *not* do so. (App., p. 23). Thus, Petitioners approached the hearing before the Special Master secure in the understanding that they would not be faced, as the Special Master had earlier characterized it," . . . with an almost impossible task . . . [of being] prepared to rebut all the evidence in the noticed earlier cases or suffer the consequences." (App., p. 25).

In his decision, however, the Special Master reneged on his oral assurances, repudiated his prior orders, and effectively took judicial notice of *all four prior proceedings*. He set out in writing upon the face of the record the four prior cases and cited them in partial support of proposition, "There can be no question that the Company possesses deep-seated anti-union animus . . ." App., p. 44).

The Special Master then proceeded to judge Petitioners, their statements, their acts, and the credibility of their witnesses in light of this "deep-seated anti-union animus." He commented time and again upon Petitioners' "anti-union animus", "unlawful hostility", "general hostile attitude", "long history of opposition to unionization", "anti-union bias and demonstrated unlawful hostility" as factors upon which to base his decisions on various allegations against Petitioners. (App., pp. 46-49).

By so doing the Special Master effectively reduced the Board's burden by altering the quantum of proof required from clear and convincing evidence to that lesser degree of proof required to sustain the findings in the previous administrative proceedings.

By so doing the Special Master presented Petitioners with the impossible task of rebutting all the evidence against them in the four previous cases.

By so doing, after assuring Petitioners he would *not* take judicial notice of the prior proceedings, the Special Master denied Petitioners the right to have presented their case in a different manner.

Neither does the subsequent review by the Court of Appeals remove the taint of prejudice with which the Special Master's findings are tinged. The Court below simply avoided the issued by ". . . find[ing] no indication" that the Special Master relied on the prior proceedings in any "substantial" manner. Petitioners submit that the Court of Appeals was not situated so as to be able to reach that conclusion. The record in this case is replete with indications that the Special Master *did* consider the previous unfair labor practice decisions. The Court of Appeals cannot speculate in hindsight on the *extent* to which the prior "convictions" of Petitioners subjectively influenced the Special Master in his deliberations.

The fact remains that the previous decisions *were* considered after Petitioners were assured they would *not* be considered. Such an absolute denial of fundamental fairness in a judicial proceeding cannot be remedied by the lower court's finding that the inequity was not "substantial".

This Court has admonished that procedural due process requires that one charged with contempt of court be advised of the charges against him and have a *reasonable opportunity* to meet them by way of defense or explanation. *Re Oliver*, 333 US 257, 275 (1948); *Re Green*, 369 US 689, 691 (1962). Nor is the concept new to this Court that substitution of a finding from a proceeding requiring a lesser degree of proof can unfairly alter the measure of proof in a later proceeding. *Maggio vs. Zeitz*, 333 US 56, 78-81 (1948) (separate opinion).

The procedure used in this case by the Special Master and sanctioned by the court below hardly comports with

the requirements of due process of law guaranteed to Petitioners. Moreover it represents a dangerous intrusion of administrative procedural policy (based on expediency and administrative expertise) upon the judicial process. By its sanction of such a procedure the Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition For A Writ of Certiorari be granted.

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